

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs March 25, 2008

**STATE OF TENNESSEE v. BRIAN EUGENE STANSBERRY, ALIAS**

**Direct Appeal from the Criminal Court for Knox County  
No. 81842     Richard R. Baumgartner, Judge**

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**No. E2007-01227-CCA-R3-CD - Filed May 19, 2008**

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This case involves an appeal by the state from an order of the trial court revoking the defendant's probation and placing him in a community corrections program rather than ordering confinement. Because we conclude that the trial court was without statutory authority to place the defendant in a community corrections program after revoking his probation, we reverse the court's judgment and order that the defendant be placed in confinement for the balance of his original two-year sentence.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed and Remanded**

J.C. McLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Cecilia Allen, Knoxville, Tennessee, for the appellant, Brian Eugene Stansberry.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Takisha Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

According to the appellate record, on November 28, 2005, the defendant pled guilty to driving after being declared a habitual motor vehicle offender, a Class E felony. *See* Tenn. Code Ann. § 55-10-601 et seq. On March 9, 2006, the defendant was ordered to serve a two-year sentence in confinement as a Range I, standard offender. Thereafter, the defendant was placed on probation pursuant to Tennessee Code Annotated sections 40-35-501(a)(3) and (a)(5), which provide that defendants receiving felony sentences of two years or less in the Department of Correction or local jail or workhouse are to be placed on probation for the remainder of their sentence upon reaching

their release eligibility date. The defendant was released from the Department of Correction on August 1, 2006, and placed on probation, his sentence to expire on December 21, 2007.

On January 25, 2007, a probation violation warrant was issued against the defendant, alleging the defendant violated the terms and conditions of his probation by committing the offenses of theft over \$10,000, evading arrest, violating the habitual motor vehicle statute, and driving on a revoked license. On March 1, 2007, a probation revocation hearing was held; wherein, the defendant submitted to violating his probation and requested that the trial court place him in a community corrections program due to his addiction to drugs and alcohol. The case was continued until May 25, 2007, to allow for an evaluation of the defendant to determine whether or not he was an appropriate candidate for a community corrections program referred to as the Community Alternative to Prison Program (CAPP). At the May hearing, the court announced that he had considered all the evidence presented at the hearings, including the defendant's criminal history, a report indicating that the defendant was an appropriate candidate for CAPP, and the defendant's need for drug treatment and rehabilitation. The court then revoked the defendant's probation from his two-year felony sentence in case number 81842 and placed him on community corrections provided that the defendant enter and complete the Centerpointe Drug and Alcohol Program, and comply with all the CAPP requirements. The court noted that the defendant's placement in the "Community Alternative to Prison Program [expired] December 21, 2007." Following the court's order, the state filed a timely notice of appeal.

### ANALYSIS

In the instant appeal, the state argues that the trial court erred in placing the defendant on community corrections after revoking his probation because Tennessee Code Annotated section 40-35-501(a)(7) requires that the defendant serve the remainder of his sentence in confinement. In rebuttal, the defendant first argues that the state has no standing to appeal the court's order revoking probation and subsequent placement in a community corrections program. The defendant next argues that section 40-35-501(a)(7) does not preclude the trial court from sentencing a defendant to community corrections and the court's sentencing determination is correct.

We first address the defendant's argument that the state cannot appeal the trial court's revocation of probation and subsequent placement of the defendant in a community corrections program. Tennessee Code Annotated section 40-35-402 enumerates the circumstances upon which the state may appeal a sentence imposed by the sentencing court. Section 40-35-402 states:

(a) The district attorney general in a criminal case may appeal from the length, range or manner of the service of the sentence imposed by the sentencing court. The district attorney general may also appeal the imposition of concurrent sentences. In addition, the district attorney general may also appeal the amount of fines and restitution imposed by the sentencing court. An appeal pursuant to this section shall be taken within the same time and in the same manner as other appeals in criminal

cases. The right of the appeal of the state is independent of the defendant's right of appeal.

(b) An appeal from a sentence is limited to one (1) or more of the following conditions:

- (1) The court improperly sentenced the defendant to the wrong sentence range;
- (2) The court granted all or part of the sentence on probation;
- (3) The court ordered all or part of the sentences to run concurrently;
- (4) The court improperly found the defendant to be an especially mitigated offender;
- (5) The court failed to impose the fines recommended by the jury;
- (6) The court failed to order the defendant to make reasonable restitution; or
- (7) The sentence is inconsistent with the purposes or considerations of sentencing set out in §§ 40-35-102 and 40-35-103.

Although the language of section 40-35-402 does not specifically mention the placement of a criminal defendant in a community corrections program as an appealable issue, a panel of this court has held that the state may pursue such appeals. *See State v. Tom Hale*, No. 03C01-9411-CR00404, 1995 WL 460916 (Tenn. Crim. App., at Knoxville, Aug. 4, 1995). Moreover, it is our view that the sentencing court did not reinstate the defendant's original sentence of confinement after revoking probation, but rather, the court imposed a new community corrections sentence. As such, the court's sentencing determination falls within the broad language of section 40-35-402(a), which allows the state to appeal from the "manner of the service of the sentence imposed by the sentencing court." Accordingly, we conclude that the limitations set forth in section 40-35-402(b) do not clearly prevent the state's challenge to the manner of the service of the sentence imposed by the trial court.

We now undertake review of the sentence imposed by the trial court. Appellate review of a trial court's order revoking probation is governed by the abuse of discretion standard. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). If the trial court has exercised "conscientious judgment in making the decision rather than acting arbitrarily," then there is no abuse of discretion. *State v. Leach*, 914 S.W.2d 104, 107 (Tenn. Crim. App. 1995). Discretion is abused only if the record contains no substantial evidence to support the trial court's conclusion that a violation has occurred. *Harkins*, 811 S.W.2d at 82.

Appellate review of a challenged sentence is a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401. This presumption of correctness is "conditioned upon the affirmative showing in the record that the trial

court considered the sentencing principles and all relevant facts and circumstances.” *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999) (citation omitted). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In this case, the state has the burden of showing that the sentence imposed by the trial court is improper. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Turning to the state’s argument, we note that section 40-35-501(a)(3) and (7) sets forth the following:

(3) Notwithstanding any other provision of law, inmates with felony sentences of two (2) years or less shall have the remainder of their original sentence suspended upon reaching their release eligibility date. The release shall not occur for sentences of two (2) years or less when the sentences are part of a consecutive sentence whose term is greater than two (2) years. The board of probation and parole shall notify the district attorney general, and the appropriate sheriff, jail administrator, workhouse superintendent or warden of the release eligibility date of all felons with sentences of two (2) years or less in the institution.

....

(7) The court is authorized to revoke probation pursuant to the revocation proceedings of § 40-35-311. If the sentencing court revokes probation, the sentencing court shall cause the defendant to commence the execution of the judgment as originally entered, less any credit for time served, plus any sentence credits earned and retained by the inmate. Any defendant whose probation has been revoked pursuant to this subsection (a) is not eligible for release on the same sentence pursuant to the terms of subdivision (a)(3). Nothing, however, prohibits the sentencing court from suspending the original sentence at any time prior to its expiration. Notwithstanding any other provision of law, the sentencing court has such authority whether the offender is incarcerated in a local jail or a prison.

Looking at the plain language of the aforementioned statute, it appears that the state is correct in its argument that the trial court was without legal authority to sentence the defendant to community corrections upon revoking the defendant’s probation. The statute expressly provides that “[i]f the sentencing court revokes probation, the sentencing court *shall cause* the defendant to commence the execution of the judgment as originally entered, less any credit for time served, plus any sentence credits earned and retained by the inmate.” Tenn. Code Ann. § 40-35-501(a)(7) (emphasis added).

As we understand the defendant’s rebuttal argument, the defendant submits that the last two sentences of section 40-35-501(a)(7) provide the trial court with authority to impose a community corrections sentence after revoking probation. We disagree. From reading the plain language of section 40-35-501(a)(7), it is our view that the last two sentences simply reserves the court’s

authority to grant probation pursuant to other provisions of our sentencing statutes. *See e.g.*, Tenn. Code Ann. §§ 40-35-302, -303, -306. Therefore, in the instant case, the trial court, after revoking the defendant's probation, was without authority to grant any form of release.

Furthermore, notwithstanding our interpretation of section 40-35-501(a)(7), it is well-settled that community corrections is unavailable to a defendant following the revocation of probation. To begin, a sentence of community corrections is distinguishable from probation. A defendant sentenced to the community corrections program is actually serving his sentence while in the program in lieu of incarceration, while service of the sentence is suspended for a defendant placed on probation. *See* Tenn. Code Ann. §§ 40-36-106(e)(1), 40-35-303(c). In *State v. Bowling*, 958 S.W.2d 362 (Tenn. Crim. App. 1997), this court noted that a distinction existed between the revocation of a community correction sentence and a probation revocation. The court stated:

When a trial court revokes a community corrections sentence under the Tennessee Community Corrections Act of 1985, it has the authority to “resentence the defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum sentence provided for the offense committed, less any time actually served in any community-based alternative to incarceration.” T.C.A. § 40-36-106(e)(3). By contrast, a trial court that determines that a probation violation has occurred can cause execution of the original judgment as it was originally entered, *see* T.C.A. § 40-35-310, -311, or can modify the defendant's conditions of supervision, including extending the defendant's probationary period for up to two years. *See* T.C.A. § 40-35-308.

*Id.* at 363. The court then held that there was no authority in Tennessee's sentencing statutes for the imposition of a community correction sentence following revocation of probation. *Id.* at 364.

While we understand that Tennessee's sentencing statutes encourage a trial court to utilize alternatives to incarceration, we conclude that in this particular case the court was without authority to place the defendant in a community corrections program after revoking his probation. Accordingly, the court's sentence is reversed and remanded. Upon remand, the trial court is directed to correct the judgment to reflect that the defendant be sentenced to commence the execution of the two-year felony sentence as originally entered, less any credit for time served, plus any sentence credits earned and retained by the defendant.

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J.C. McLIN, JUDGE